



U.S. Court Ruling Threatens Consumer Bureau Decisions

By Carter Dougherty - Jan 26, 2013

A federal court ruling limiting presidential appointment power could jeopardize a large swath of the work undertaken by the Consumer Financial Protection Bureau in the last year.

Although a court would still have to decide on the appointment of Richard Cordray, the agency's first director, the ruling by the U.S. Court of Appeals in Washington raises the possibility that regulations and enforcement actions of the new agency could be overturned, according to regulatory lawyers.

"This is very bad news for the bureau, there is no way to slice it any other way," Deepak Gupta, a former top lawyer at the CFPB, said in an interview. "There is little question that this applies to the Cordray appointment."

Among the bureau's achievements under Cordray are new consumer protections on international money transfers and rules on mortgage underwriting and servicing. The bureau also reached settlements with credit card companies, including Riverwoods, Illinois-based Discover Financial Services (DFS) and McLean, Virginia-based Capital One Financial Corp. (COF), for deceptive marketing practices.

The CFPB said its work is not affected by the ruling on the NLRB appointments.

"The bureau is not a party in the case decided today, and the court's ruling has no direct effect on the bureau," CFPB spokeswoman Moira Vahey said in a statement yesterday. "Going forward, we will continue our essential work to protect American consumers."

President Barack Obama bypassed Republican opposition to Cordray's nomination in the U.S. Senate by installing him -- and three officials of the National Labor Relations Board -- through a so-called recess appointment in January 2012. That move put Cordray in the job through the end of 2013.

Full Term

Obama nominated Cordray to a full five-year term on Jan. 24.

Now that a federal appeals court has invalidated the labor appointments, saying they did not occur during an official recess, a similar ruling against CFPB could alter the landscape of consumer finance regulation. For the industry, the decision creates uncertainty at a time when it is digesting a raft of new rules that are aimed at the causes of the 2008 financial crisis.

"We're not gloating here," Richard Hunt, president of the Consumer Bankers Association, said in an interview. "It creates chaos in the marketplace. But we knew this was possible when the president made this controversial appointment."

The CFPB, created by the 2010 Dodd-Frank law that overhauled U.S. oversight of financial services, is intended to protect consumers from abusive practices. Covering both banks and non-bank firms like payday lenders and debt collectors, the agency has also created a system for resolving consumer complaints.

Dodd-Frank Timeline

Dodd-Frank created a timeline for the bureau to assume its powers. It assumed powers over banks with assets above \$10 billion on July 21, 2011 but the law only permitted its other powers, such as supervision of non-banks, once its first director was confirmed by the Senate.

Senate Republicans, using rules that let the minority block nominations, closed ranks to oppose any nominee in 2011 unless the Obama administration agreed to create a commission to run the CFPB and subject its budget, now linked to the Federal Reserve, to congressional appropriations.

Obama tried to outflank Republicans by using a recess appointment, the constitutional power to install officials while the Senate is in recess. The court yesterday said that his move was, in the case of the labor officials, “constitutionally invalid” because the Senate was not officially in recess at the time.

Judge’s Ruling

“Considering the text, history and structure of the Constitution, these appointments were invalid from their inception,” U.S. Circuit Judge David Sentelle wrote. The ruling today is the first substantive decision by a federal appeals court on several challenges to the president’s naming of the NLRB members on Jan. 4, 2012.

Raymond Natter, a partner with Barnett Sivon & Natter P.C. in Washington said a company can now go to court and seek a “summary judgment motion” overturning the Cordray appointment and his actions on the basis of the decision in the labor case. Natter’s firm represents financial services companies.

“It means rules would have to be reissued,” Natter said in an interview. “Proposals would have to be re-proposed. Enforcement actions could be reversed.”

One possible candidate for that role, Natter said, is State National Bank of Big Spring, Texas, which in June filed a lawsuit in federal court in Washington. It charged that the CFPB is unconstitutional because Congress does not appropriate its budget and because the president has a limited ability to remove its director.

Supreme Court

C. Boyden Gray, one of the attorneys who helped bring the case, said the labor case still had a ways to go.

“This is not the final word,” Gray, who served as legal counsel to President George H.W. Bush from 1989 to 1993. “It will go to the Supreme Court.”

Gray called today’s ruling “helpful” in the context of his lawsuit, though not necessarily decisive. “We’re challenging the entire structure of the CFPB. We’re challenging its ability to do everything that it’s doing,” he said.

The case brought by Gray faces other hurdles. The Obama administration has argued that the Texas bank has no standing to bring the case because it has not been affected by CFPB actions.

The question of what is left of the CFPB's work over the last year could become the subject of complicated parsing by the courts, Natter and Gupta said. One legal doctrine holds that the actions of invalid appointees can be preserved to avoid chaos in a regulated market.

Cordray Defense

Previous regulatory action would probably survive under that doctrine while companies facing current enforcement action could raise Cordray's status as a defense.

"This really throws a wrench into pending enforcement proceedings," Gupta, now a partner with Gupta Beck PLLC in Washington, said.

Congressional Republicans immediately seized on the labor case as a reason why Cordray's appointment was not legal.

"This decision now casts serious doubt on whether the president's 'recess' appointment of Richard Cordray to the Consumer Financial Protection Bureau, which the President announced at the same time, is constitutional," Senate Minority Leader Mitch McConnell of Kentucky, said in an e-mailed statement.

Mark Calabria, a former Senate Republican staffer, said the NLRB would probably have the ripple effect of stalling any progress Cordray makes in the Senate after his renomination. They would also embolden Republicans in their quest to change the law.

Process Questioned

"How can you have a confirmation process if a court has said he's been unconstitutionally appointed?" Calabria, director of financial regulation studies at the Cato Institute in Washington, said in an interview.

White House press secretary Jay Carney said the ruling affects only the NLRB case and "has no bearing on" the president's recess appointment of Cordray.

He said the ruling was "novel and unprecedented" and contradicts 150 years of practices by Democratic and Republican administrations. "The court decided a case brought by a specific company and the decision applies to that case. It does not apply more broadly than that."

The decision also comes at a moment of leadership change at the upper levels of CFPB. Raj Date, the bureau's deputy director, is scheduled to leave on Jan. 31. No replacement has been named.